United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-7517

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ERNEST CORALLUZZO,

Appellee,

against

NEW YORK STATE PAROLE BOARD and MEMBERS OF THE NEW YORK STATE PAROLE BOARD, individually and in their official capacity,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE

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Appellants.

BRIEF FOR APPELLEE

Preliminary Statement

The New York State Board of Parole appeals from a judgment of the United States District Court for the Western District of New York (John T. Curtin, Ch. J.) entered October 6, 1976, ordering defendant Board to grant plaintiff Ernest Coralluzzo a new minimum period of imprisonment (hereinafter MPI) hearing under N.Y. Corr. L. § 212-2, at which the Board is to grant him access to the actual documents in his file, and after which the Board is to give reasons for their determination, under the standards set down in this Court's decision in *Johnson v. Chairman, New York State Board of Parole*, 500 F.2d 925 (2d Cir. 1974).

The District Court held that due process attaches to MPI decisions, and specifically held that the disclosure of this in-

formation to Coralluzzo and other inmates was a "rational means to insure that an inmate is protected 'from arbitrary and carpricious decisions or actions granted upon impermissible considerations.' " (App. 48), and is required by due process. Because the reasons given by the Board at the first MPI hearing were not given to Coralluzzo until 12 days after the commencement of this action, and because a new hearing was required in any event, Judge Curtin declined to consider the adequacy of those reasons.

Questions Presented

1. Whether due process applies to a minimum period of imprisonment hearing conducted by the New York State Parole Board.

2. Whether the statement of reasons given by the Parole Board in this case satisfies due process.

3. Whether due process requires that the Parole Board disclose to a prisoner the contents of his parole file at the MPI hearing.

Statutes Involved

New York Penal Law:
§ *70.00 Sentence of imprisonment for felony*

1. Indeterminate sentence. Except as provided in subdivision four, a sentence of imprisonment for a felony shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

2. Maximum term of sentence. The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows.

* * *

(b) For a class B felony, the term shall be fixed by the court, and shall not exceed twenty-five years;

* * *

3. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence shall be at least one year and shall be fixed as follows:

* * *

(b) Where the sentence is for a class B, class C or class D felony and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that the ends of justice and best interests of the public require that the court fix a minimum period of imprisonment, the court may fix the minimum period. In such event, the minimum period shall be specified in the sentence and shall not be more than one-third of the maximum term imposed. When the minimum period of imprisonment is fixed pursuant to this paragraph, the court shall set forth in the record the reasons for its action; and

(c) In any other case, the minimum period of imprisonment shall be fixed by the state board of parole in accordance with the provisions of the correction law.

* * *

New York Corrections Law:

§ 6-a. Powers and duties of state board of parole

1. The state board of parole shall have the power and duty of determining what inmates serving an indeterminate or a reformatory sentence of imprisonment may be released on parole and when and under what conditions. Such board shall also have the power and duty of determining the conditions of release of a person who may be conditionally released under an indeterminate or reformatory sentence of imprisonment and of determining what inmates serving a definite sentence of imprisonment may be conditionally released and when and under what conditions. Any such power shall be subject to all other provisions of law with respect to eligibility of inmates for release on parole and conditional release and shall be exercised in a manner consistent with other provisions of law.

* * *

§ 210. Board of parole; powers and duties

Subject to other provisions of law, the board of parole in the division of parole of the executive department shall be charged with the duty of determining what inmates serving an indeterminate or a reformatory sentence of imprisonment in institutions under the jurisdiction of the state department of correction may be released on parole and when and under what conditions. The division of parole shall also be charged with the duty of supervising all prisoners released on parole or conditionally released from such institutions and of making such investigations as may be necessary in connection therewith, of determining whether violation of parole or conditional release conditions exist in specific cases and of deciding the action to be taken with reference thereto. The division of parole shall aid inmates eligible for parole or conditional

release, and those who are on parole or conditional release, to secure employment and shall encourage and promote apprenticeship training of such persons through the assistance and cooperation of industrial and labor organizations. It shall also be the duty of the members of such board to personally study or to cause to be studied the inmates confined in the institutions of the state, over which the board of parole has paroling jurisdiction, so as to determine their ultimate fitness to be paroled.

* * *

§ *211. Pre-parole records*

As each inmate under an indeterminate or a reformatory sentence is received in an institution under the jurisdiction of the state department of correction, it shall be the duty of the parole board while the case is still fresh to cause to be obtained and filed information as complete as may be obtainable at that time with regard to each such inmate. Such information shall include a complete statement of the crime for which he is then sentenced, the circumstances of such crime, all pre-sentence memoranda, the nature of his sentence, the court in which he was sentenced, the name of the judge and district attorney and copies of such probation reports, as may have been made as well as reports as to the inmate's social, physical, mental and psychiatric condition and history. It shall be the duty of the clerk of the court, the commissioner of mental hygiene and all probation officers and other appropriate officials to send such information as may be in their possession or under their control to the board of parole upon request. The board of parole shall also at that time obtain and file a copy of the complete criminal record of such inmate and any family court record that may exist. When all such existing available records have been assembled, they shall be

presented to the board of parole or to some officer designated by it, who shall determine whether any further investigation of such inmate is necessary at that time, and, if so, the nature of such investigation, and shall thereupon order it to be made. Such investigations shall be made while the case is still recent, and the results of them with all other information shall be filed in the office of the division so as to be readily available when the parole of such inmate is being considered.

* * *

§ *212. Parole and conditional release under indeterminate and reformatory sentences*

1. The provisions of this section shall govern, to the exclusion of other provisions of this article, the duties and powers of the board of parole and the procedures with respect to parole and conditional release and the revocation thereof where an indeterminate or reformatory sentence has been imposed pursuant to the provisions of the penal law as enacted by chapter ten hundred thirty of the laws of nineteen hundred sixty-five, as amended. Matters not expressly covered herein or covered in such penal law shall be governed by such other provisions of law as may be applicable.

2. In any case where a person is received in an institution under the jurisdiction of the state department of correction with an indeterminate sentence, and the court has not fixed the minimum period of imprisonment, the board shall cause to be brought before one or more members not sooner than nine months or later than one year from the date the term of such sentence commenced all information with regard to such person referred to in section two hundred eleven and such of the information specified in subdivision four of section two hundred fourteen of this chapter as may have been compiled.

The member or members receiving such information shall study same and shall personally interview the sentenced person. Upon conclusion of the interview, such member or members shall make a determination as to the minimum period of imprisonment to be served prior to parole consideration. Such determination shall have the same force and effect as a minimum period fixed by a court, except that the board may at any time make subsequent determinations reducing such minimum period provided that the period shall in no case be reduced to less than one year. Notification of the determination and of any subsequent determination shall be furnished in writing to the sentenced person and to the person in charge of the institution as soon as practicable.

2-a. In any case where the minimum period of imprisonment is fixed, pursuant to subdivision two of this section, at more than one-third of the maximum term, or at more than three years from the date the sentence commenced, whichever is less, such determination shall be deemed tentative and shall be reviewed by the entire board as soon as practicable. Provided, however, that in any case where the minimum period of imprisonment is fixed at more than one-third of the maximum term, but not more than one-half of the maximum term and not more than three years from the date the sentence commenced, such minimum period of imprisonment may be fixed by three members of the board without the necessity for review by the entire board. Upon any such review it shall not be necessary for the board members to personally interview the sentenced person and the decision of a majority of the board shall constitute the determination.

3. At least one month prior to the expiration of the minimum period or periods of imprisonment fixed by the

court, or fixed as provided in subdivision two of this section, the board shall determine whether a person serving an indeterminate sentence of imprisonment should be paroled at the expiration of the minimum period or periods. Such determination shall be made in accordance with sections two hundred thirteen and two hundred fourteen of this chapter insofar as consistent with this section. If the board does not grant parole at such time, it shall specify a date not more than twenty-four months from the date of such determination for reconsideration, and the procedures to be followed upon reconsideration shall be the same.

* * *

§ *213. Reasons for release*

Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board of parole is of opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society. If the board of parole shall so determine, such prisoner shall be allowed to go upon parole outside of prison walls and enclosure upon such terms and conditions as the board shall prescribe and shall remain while thus on parole in the legal custody of the board of parole until the expiration of the maximum term or period of the sentence or return to an institution under the jurisdiction of the commissioner of correction.

* * *

§ *214. Method of release*

1. The release of a prisoner on parole shall not be upon the application of the prisoner, but solely upon the initiative

of the board of parole. No application for release on parole made by a prisioner or on his behalf shall be entertained by the board of parole.

2. At least one month prior to the expiration of the minimum term of each prisoner eligible for parole, it shall be the duty of the board of parole to cause to be brought before it all information with regard to such prisoner referred to in section two hundred and eleven.

3. Within six months after conviction and at least once every two years thereafter during the term of each prisoner sentenced for an indeterminate term, having a minimum of one day and a maximum of his natural life, the board of parole shall cause to be brought before it with respect to such prisoners all information referred to in section two hundred eleven. When considering the release on parole of such prisoner, the board shall have before it a complete report of the physical, mental and psychiatric condition of such prisoner, which report shall have been prepared within two months of the date of such consideration, and shall contain all facts and findings necessary to assist the board in making its determination.

4. In addition and with respect to all prisoners, the board of parole shall have before it a report from the warden of each prison in which such prisoner has been confined as to the prisoner's conduct in prison, with a detailed statement as to all infractions of prison rules and discipline, all punishments meted out to such prisoner and the circumstances connected therewith, as well as a report from each such warden as to the extent to which such prisoner has responded to the efforts made in prison to improve his mental and moral condition, with a statement as to the prisoner's then attitude towards society, towards the judge who sentenced him, towards the

district attorney who prosecuted him, towards the policeman who arrested him, and how the prisoner then regards the crime for which he is in prison and his previous criminal career. In addition, the board shall have before it a report from the superintendent of prison industries giving the prisoner's industrial record while in prison, the average number of hours per day that he has been employed in industry, the nature of his occupations while in prison and a recommendation as to the kind of work he is best fitted to perform and at which he is most likely to succeed when he leaves prison. Such board shall also have before it the report of such physical, mental and psychiatric examinations as have been made of such prisoner which so far as practicable shall have been made within two months of the time of his eligibility for parole. The board of parole, before releasing any prisoner on parole, shall have the prisoner appear before such board and shall personally examine him and check up so far as possible the reports made by prison wardens and others mentioned in this section. Such board shall reach its own conclusions as to the desirability of releasing such prisoner on parole. No prisoner shall be released on parole unless the board is satisfied that he will be suitably employed in self-sustaining employment if so released.

5. Appearance before the board pursuant to subdivision four of this section shall mean a personal interview by at least three members of the board at the institution in which the inmate is confined or at such other place within the state as may be agreed upon between the chairman of the board and the commissioner of correctional services. Release on parole shall be determined by unanimous vote of the board members who personally interviewed the inmate or by the vote of a majority of the entire board of parole pursuant to rules of the board.

6. If, after appearance before the board pursuant to subdivision four of this section, the prisoner is denied release on parole, the board shall inform such prisoner, in writing and within two weeks of such appearance, of the facts and reason or reasons for such denial.

* * *

Statement of Facts

On February 1, 1975, Plaintiff, Ernest Coralluzzo, was committed to the New York State Department of Corrections for service of an indeterminate sentence of up to 15 years, pursuant to his plea of guilty of one count of second degree criminal sale of a dangerous drug (cocaine), in violation of the New York Penal Law, § 220.40. Coralluzzo was also sentenced in United States District Court to a term of up to eight years, pursuant to a plea of guilty to one count of conspiracy to distribute a quantity of cocaine, in violation of 21 U.S.C. § 841, which sentence he is serving concurrently with the State sentence. Coralluzzo, who is 35 years old, with a wife and two small children, had never been convicted of a crime prior to these convictions.

On January 15, 1976, Coralluzzo met with three members of the Parole Board at a "Minimum Period of Imprisonment" (MPI) hearing, pursuant to New York Corrections Law, § 212-2. At this hearing, Coralluzzo was not permitted to view or contest the contents of the documentary materials before the board members. After Coralluzzo left the meeting, the board members set his MPI at five years, and recorded in his file:

> The case history makes it reasonable to conclude that this man's involvement in narcotics traffic is deeprooted and

high level. Permanent separation from drugs seems improbable sooner than five years (App. 21, 23).[1]

Coralluzzo was not notified of these purported reasons, however, and the "Minimum Sentence Notice" given him informed him only that he had been assigned a five year MPI and that he would "appear for release consideration at the February, 1980 board meeting" (App. 13). The decision was affirmed by the full Board on February 23, 1976 (App. 18, 22). The "reasons" were given to Coralluzzo only on another "Minimum Sentence Notice" served on him March 3, 1976, after the commencement of this action on February 20, 1976 (App. 16-17; 32).

On February 20, 1976, Coralluzzo commenced this action under 42 U.S.C. § 1983, seeking a declaration that the Parole Board hearing of his application for release had violated his due process rights, and an order requiring the Board to conduct another hearing consistent with due process (App. 9-12).[2]

On August 6, 1976, Judge Curtin issued an opinion and order (App. 24-32) requiring the Board to hold a new MPI hearing within 60 days of that order. The Court held that the MPI decision, "a critical decision to the inmate" was required to be conducted according to due process standards (App. 29-

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[1] Citations in this form refer to the page numbers in the Appendix filed by Appellant Board of Parole. Because the transcript of the Board hearing included in that Appendix is virtually unreadable, Appellee has included the transcript of that hearing as an Appendix bound with this brief, which will be cited in the form "1a", together with the citation to the page in Appellant's Appendix.

[2] As the Complaint sought to challenge "the manner of parole decision making, not its outcome," no exhaustion of state remedies is required. *Haymes v. Regan*, 525 F.2d 540, 542 (2d Cir. 1975).

30). As to what process is due a prisoner at an MPI hearing, Judge Curtin specifically held that the reasons requirement of *Johnson v. Chairman, New York State Board of Parole*, 500 F.2d 925 (2d Cir. 1974), should apply as well as to MPI hearings (App. 28-30). The Court held at that time that, at the MPI hearing, the Board would be required to give Coralluzzo "access to the actual documents used against him" (App. 32, n.2a).

On August 10, 1976, the Parole Board moved the District Court to amend its judgment insofar as it required the Board to grant Coralluzzo access to the evidence against him. On October 6, 1976, the District Court issued the opinion and order herein appealed from (App. 38-48). The Court more fully discussed the requirement of disclosure, framing the question:

> whether mandatory inspection of the file by the Plaintiff would so appreciably enhance the protections accorded the inmate or add to the fairness of the inmate's MPI proceeding as to be required by the due process clause of the Fourteenth Amendment. See *Haymes v. Regan, supra*, at 544 (App. 40).

Applying the three-pronged test laid down in *Haymes*, the Court held that the requirement of disclosure was particularly appropriate in cases such as Coralluzzo's, where there was an unsubstantiated allegation of organized crime involvement, and noted that the sentencing state Court had ordered an allegation to that effect stricken from the pre-sentence report when the District Attorney failed to "respond to the material allegation of the motion" to strike the allegation (App. 37, 49 n.2).[3]

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[3] The Court stated:

Considerable documentation exists that inmates' prison files frequently contained erroneous information and that, in particular, serious errors are often made by the government in determining that an inmate has links with organized crime. *Cardaropoli* [525 F.2d 990] at 997; *Masiello v. Norton*, 364 F.Supp. 1133 (D.Conn. 1973); *Franklin v. Shields* [399 F.Supp. 309]; *LaBonte v. Gates*, [406 F.Supp. 1277] (App. 43-44).

The District Court held that the burden on the Board of disclosing such information is "minimal. Any possible 'adverse consequences' could be avoided by the Government's showing good cause for keeping the information secret" (App. 44), and reaffirmed its prior order.

With Plaintiff's consent, the Court's order was stayed pending this appeal.

POINT I

Due process applies to MPI hearings conducted by the New York State Parole Board.

In *Johnson v. Chairman, New York State Board of Paroles*, 500 F.2d 925, 928 (2d Cir. 1974), this Court held that "some degree of due process applies to parole release proceedings." This holding turned on the realization that *Morrissey v. Brewer*, 408 U.S. 471 (1972) had

> rejected the concept that due process might be denied in parole proceedings on the ground that parole was a "privilege" rather than a "right.". . . Parole was thenceforth to be treated as a "conditional liberty," representing an "interest" entitled to due process protection. A prisoner's interest in prospective parole, or "conditional entitlement" must be treated in like fashion. To hold otherwise would be to create a distinction too gossamer-thin to stand analysis. Whether the immediate issue be release or revocation, the stakes are the same: conditional freedom versus incarceration. 500 F.2d 927-28.

Johnson was reaffirmed and followed by this Court in *Haymes v. Regan*, 525 F.2d 540 (2d Cir. 1975), and *Holup v. Gates*, No. 76-2013 Slip. Op. p. 5881 (October 20, 1976).

Appellee submits that the same reasoning holds true for an MPI hearing in that an MPI hearing is substantially the same

as the New York Parole Board release hearing with which the Court was concerned in *Johnson* and *Haymes*.

Appellee, Coralluzzo, was sentenced to an indeterminate term of up to 15 years, under New York Penal Law § 70.00-1. As the Court did not set a higher minimum sentence, he was required to serve a minimum of one year, P.L. § 70.00-3. In such circumstances, Corr. L. § 212-2 provides for a MPI hearing, to be held between 9 months and 1 year after the beginning of a prisoner's sentence. Under that section the Board at this hearing was required to fix the minimum period of imprisonment, and was empowered to set that MPI at 1 year or a longer period. As Judge Curtin stated it, the MPI hearing "may result in scheduling a parole release hearing and a grant of parole within a matter of days after the MPI hearing" (App. 28).[4]

At a parole release hearing, the Board may order that a prisoner be released, either immediately, or at a certain future date.[5] At the MPI hearing, the Board has essentially the same power: to order that a prisoner be released, or be scheduled for a parole release hearing followed by release, at a near future date. At both hearings, the Board's choice is the same: to release the prisoner, or to continue him in custody: "the stakes are the same: conditional freedom versus in-

[4] Indeed, it is hardly clear why a new hearing would be required, at least in Coralluzzo's case. The only apparent difference in procedure provided in the statutes and regulations for the MPI and the parole release hearings, is that, under § 212-2, the MPI hearing can be conducted by one or two members of the Board, while parole release hearings are required by § 214-5 to be conducted by at least three members. Here, Coralluzzo met with three Board members at his MPI hearing.

[5] Corrections Law § 212-3 specifically contemplates release dates in the future by requiring the setting up of a parole release hearing "at least one month prior to the expiration of the minimum period of imprisonment."

carceration." *Johnson*, 500 F.2d at 928. For the Board to set an MPI date four years in the future is, in substance, to deny a prisoner parole. Appellee submits that due process must therefore apply to an MPI hearing just as to a parole release hearing.

This Court has previously recognized the functional similarity of MPI hearings and parole release hearings, in *Walker v. Oswald*, 449 F.2d 481, 484 (2d Cir. 1971):

> The purpose of the Board interview [at an MPI hearing] is to ascertain an inmate's background, to determine the inmate's needs in terms of correctional treatment, to explain to him what is expected of him before considering his release on parole, and to set a tentative date for considering his release on parole. In effect, then, the Board proceeding in question here is very much like an interview to schedule, tentatively, and subject to change, a hearing for parole release. As such, in our view, *it is an integral part of the parole release process, and hence our decision* denying the right to counsel *in parole release hearings controls the instant case* (emphasis added).

See also, *Childs v. United States Board of Parole*, 511 F.2d 1270, 1284 (D.C. Cir. 1974).

Just as the Court's decisions concerning the right to counsel apply to both MPI and parole release hearings—because of the substantial similarity of the two hearings—so should this Court's opinions concerning the right to a statement of reasons, and to due process generally, apply to both hearings. Judge Curtin's holding that *Johnson* and *Haymes* should apply to MPI hearings should therefore be affirmed.

POINT II

The statement of reasons given by the Parole Board does not satisfy due process.

Assuming, as we have argued, that *Johnson* applies to MPI hearings as well as parole release hearings, the question[6] arises whether the reasons stated by the Board meet the standard set forth in *Johnson*, 500 F2d at 934.

> To satisfy minimum due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all. For this essential purpose, detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision (e.g., that in its view the prisoner would, if released, probably engage in criminal activity) and the essential facts upon which the Board's inferences are based (e. g., the prisoner's long record, prior experience on parole, lack of a parole plan, lack of employment skills or of prospective employment and housing, and his drug addiction): See Beckworth v. New Jersey State Board of Parole, 62 N.J. 348, 301 A.2d 727 (1973).

Here, the Board gave as its reasons for setting a five year MPI:

> The case history makes it reasonable to conclude that this man's involvement in narcotics traffic is deeprooted and

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[6] Judge Curtin below declined to reach this question, as the reasons were not given to Coralluzzo prior to the commencement of this lawsuit, and a new MPI hearing was required in any event. Appellee offers this analysis as a separate ground for affirming the District Court's order requiring a new MPI hearing, irrespective of the Court's resolution of the issue of disclosure.

high level. Permanent separation from drugs seems improbable for five years.

It does not require extended analysis to show that these reasons do not measure up under *Johnson*.

The most basic defect in the "statement of reasons" is its complete failure to cite any facts whatever to support its conclusions. The Board stated that Coralluzzo's "involvement in narcotics traffic is deeprooted and high level," but this is only a conclusion. The Board does not state in any facts that might support this conclusion, for example, that he was a professional criminal with a significant role in a criminal organization, *cf. Masiello v. Norton*, 364 F.Supp. 1133, 1136 (D.Conn. 1973). Rather, the only attempt to found this conclusion on fact, as required by *Johnson*, is the Board's reference to "the case history makes it reasonable to conclude . . ." But that is itself a conclusion, not a fact.

That Coralluzzo was convicted of two closely related drug sale offenses is an established fact. But the Board has not relied only on that fact. Rather, the Board's conclusion goes quite far beyond that fact, and postulates a deep-rooted and high level involvement, above and beyond the two individual events for which he was convicted. It follows that the Board's conclusion is either without factual support, or was based on facts in the "case history" which are not recited in the statement of reasons. Without disclosing these facts—whatever they are, and if they exist and are accurately recorded—the statement of reasons does not meet the standard of *Johnson*. The facts which were relied upon by the Board may be contained in that case history, but, at the least, the failure of the Board to cite them prevents this Court from determining whether it is "reasonable to conclude" from them that the grounds cited are proper and based on fact.

In addition, it is hardly clear from these reasons that all relevant factors had been considered, as the reasons requirement is designed to ensure. Coralluzzo, is a thirty-five year old married man with two young children, the owner of a home, who was continuously employed from 1959 to 1973, who, after suffering some business reverses in attempting to start his own trucking firm, got deeply into debt and agreed to aid in "ripping off drug dealers" (App. 20; 23a), during the course of which endeavor he committed the crimes for which he was convicted and sentenced. He has no prior criminal convictions. All this information should be reflected in his case file, and some of it was brought up by Coralluzzo at the MPI hearing. Yet nothing of this appears in the conclusory "reasons."

As will be more fully discussed in Point III, *infra,* the possibility of arbitrary decisions based on factual errors are all the greater in this case, where there is an unsubstantiated allegation of organized crime involvement, which, as Judge Curtin recognized below (App. 42) and as this Court has previously observed, *Cardarcpoli v. Norton,* 523 F.2d 990, 997, is an area in which factual errors are frequently made by parole and prison officials.

The requirement of a statement of reasons at the MPI hearing will place little additional burden on the Board, as statement of reasons, of some nature, are already required by State law, e *Festus v. Regan,* 50 A.D. 2d 1084, 376 N.Y.S. 2d 56 (4th Dept. 1975), and are attempted by the Parole Board, as in this case. The only burden, therefore, is that of making these reasons sufficient under the test of *Johnson.*

For the above reasons, the District Court's order requiring a new MPI hearing should be affirmed on this ground.

POINT III

Due process requires that the Parole Board grant prisoners access to the documentary materials in their files at an MPI hearing.

The District Court ordered that, at the new MPI hearing, Coralluzzo be allowed to read the actual documents on his parole file, excepting only those for which the Board had good cause for keeping the information secret. Appellee submits that the District Court reached the correct result.

This Court has recently considered the question of disclosure of parole board files in *Holup v. Gates*, No. 76-2013 Slip Op. 5881 (October 20, 1976), decided two weeks after Judge Curtin's decision below. In *Holup*, Connecticut prisoners sought inspection of their parole files *in advance of their release hearings*. The Court summarized the law of due process as it has developed in this Circuit:

> In *Haymes* v. *Regan*, 525 F.2d 540, 543 (2d Cir. 1975), we specifically considered a three-pronged test to be applied in deciding what procedural protections are constitutionally due in the particular state proceeding, the balance between "the inmate's interest in the proceedings... 'the need for and usefulness of the particular safeguard in the given circumstances' . . . [and] any direct burden which might be imposed on the Board by this requirement," citing *Frost* v. *Weinberger*, 515 F.2d 57, 66 (2d Cir. 1975) and *Hannah* v. *Larche*, 363 U.S. 420, 442 (1960). We followed the balancing test earlier laid down in *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925, 928-29 (2d Cir. 1974). *See Bradford* v. *Weinstein*, 519 F.2d 728, 733 (4th Cir. 1974), *vacated as moot*, ... U.S. ...., 96 S. Ct. 347 (1975). Slip Op. at 5886

The Court framed the question of *advance* disclosure:

> The Supreme Court has never passed on the question, however, whether a presentence report must be shown to a defendant in advance of sentencing.[4] The Court has held that a sentence cannot stand if it is based on assumptions concerning the defendant's criminal record that are "materially untrue." *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948), or if it is founded "in part upon misinformation of constitutional magnitude." *United States* v. *Tucker*, 404 U.S. 443, 447 (1972). With this resolution of the ultimate effect of material mistake, we must, of course, agree. And, as we explained in *United States ex rel. Johnson*, *supra*, 500 F.2d at 930, in the case of a parole board, judicial review should be available "when its decision has no basis in the prisoner's file." *See also Kohlman* v. *Norton*, 380 F. Supp. 1073, 1074-75 (D. Conn. 1975). The question is whether due process requires us to assume that only by exposing every prison file in advance can misinformation or failure to consider information favorable to the prisoner in the parole release process be substantially avoided. Slip Op. at 5888

Where there had been no hearing below concerning the single appellant, the Court concluded: "We do not have sufficient hard evidence in this record upon which to base a judgment" and remanded for a hearing on the usefulness on divulging file contents in avoiding arbitrary decisions, and on the burden to the board of such advance disclosure. Slip Op. at 5889.

If Judge Curtin had ordered *advance* disclosure in Coralluzzo's case, *Holup* would require a remand with similar directions here. However, because the burdens on the board of disclosure *at the hearing*, as ordered by Judge Curtin, are less than for advance disclosure, and because of the substantial possibility of taint suggested by the unsubstantiated organized crime allegations here, Appellee submits that no further evidence is required for a correct assessment under the three-pronged test set out in *Haymes*.

We argue here, in subpoint A, that on the basis of the record before this Court, the three-pronged test of *Haymes* and *Holup* compels the conclusion that Judge Curtin was correct in ordering disclosure in this case. We shall further argue, in subpoint B below, that the same result is compelled by the force of this Court's decisions mandating full disclosure in the parole revocation situation, *Carson v. Taylor*, 540 F.2d 1156 (2d Cir. 1976), and *Shepard v. United States Board of Parole*, No. 76-2021, Slip. Op. 5413 (2d Cir. Sept. 7, 1976), when those cases are read together with this Court's leading decisions in the parole release context, *Johnson, supra* and *Haymes, supra*, and with the Supreme Court decisions on which both lines of cases rest, *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Wolff v. McDonnell*, 418 U.S. 539 (1974).

A.

1. The first prong of the three-pronged test is "the inmate's interest in the proceedings." *Haymes*, 525 F.2d at 543; *Holup*, Slip Op. at 5886. As this Court held in *Johnson*, the inmate's "interest is *enormous*. To him the Board's decision represents the difference between incarceration and conditional liberty." 500 F.2d at 929 (emphasis added).

2. The second prong of the test is "the need for and relative usefulness of the particular safeguard in the given circumstances." *Haymes*, 525 F.2d at 543. Appellee submits that the disclosure of the parole file, in the context of this case, is of very great usefulness, and of sufficient usefulness over and above the reasons requirement as to overbalance the small burden placed upon the Board by a requirement of disclosure.

In the absence of disclosure, it is very hard to see how a prisoner can make any meaningful attempt to discuss the in-

formation in the file or to correct any errors which appear therein.* There is very substantial evidence that parole board files very often contain factual errors, or information untested for relevancy, reliability, bias or prejudice. Hearings Before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 2d Sess. at 451 (1972) (testimony of Dr. Willard Gaylin) ("I have seen black men listed as white and Harvard graduates listed with borderline IQ's."); "Everybody...who is closely connected with the processing of offenders knows that the recording of information is not treated with any great respect." *D. Gottfredson et al., Parole Decision Making* 49 (Nat'l Council on Crime & Delinq. 1973); *cf. Franklin v. Shields*, 399 F. Supp. 309, 313 (W.D. Va. 1975) (finding of fact that Virginia Parole Board relies on factually erroneous information never verified by the Board); *Kohlman v. Norton*, 380 F. Supp. 1073 (D. Conn. 1974) (parole denied because file erroneously indicated that applicant had used gun in committing robbery); *Leonard v. Mississippi State Probation and Parole Board*, 373 F. Supp. 699 (D. Miss. 1974)

* See also *In re Previtt*, 503 P. 2d 1326, 1331 (Cal. Sup. Ct. 1972):

> From the inmate's point of view a policy of nondisclosure increases the potential for unfairness. Unless the prisoner learns what information is in the Authority's possession he cannot intelligently decide what subjects to discuss at his predisposition interview. .... Especially with respect to statements containing information which may be inaccurate and was not presented at trial—either because the information was not sufficiently trustworthy, was not legally admissible or had not been obtained at that time—*the inmate may have no knowledge of even the fact of the lodging of false or inaccurate charges. In such a situation a refusal to apprise him of the source and nature of the information would effectively deny all reasonable opportunity to respond.* " '[T]he stakes are simply too high . . . and the possibility for honest error or irritable misjudgment too great, to allow' " submission of such potentially damaging remarks without at least an opportunity to challenge them (emphasis added).

(prisoner denied parole on the basis of illegal disciplinary action); *Masiello v. Norton*, 364 F. Supp. 1133 (D. Conn. 1973) (unsupported hearsay allegation, that petitioner would ally with father if released, insufficient basis for parole denial); *Billiteri v. U. S. Board of Parole*, 385 F. Supp. 1217 (W.D.N.Y. 1974) (crimes for which prisoner incarcerated incorrectly recorded in file); *Robinson v. U.S. Board of Parole*, 403 F. Supp. 638 (W.D.N.Y. 1975) (same); *In re Rodriguez*, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975) (file material, later proven in error, led parole officers to believe that prisoner, a nonviolent sex offender, had violent tendencies. 14 Cal. 3d at 648 n.14; parole evaluation asserted that "family rejects him," when in fact prisoner had a home and employment in family business waiting for him. *Id.* at 651 n.16); *State v. Pohlabel*, 61 N.J. Super. 242, 160 A.2d 647 (1960) (presentence report erroneously stated, among other errors, that prisoner was under a life sentence in another jurisdiction); A Bruce, A. Harno, E. Burgess, J. Landesco, *The Workings of the Indeterminate-Sentence Law and the Parole System in Illinois* 77 (1928) (parole board files inconsistent, ambiguous, and incomplete); D. Dressler, *Practice and Theory of Probation and Parole* 115-16 (2d ed. 1969) (files often contain incomplete and erroneous information); Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature, 88, 91 (1974) (denial of parole, because of failure to utilize educational programs, by board member unaware that no such programs then existed at unit which prisoner was assigned; misleading effect of vague and conclusory characterization of disciplinary violations); Final Report of the Joint Committee on Prison Reform of the Texas Legislature 89 (1974) ("[T]he Board has denied parole for reasons later discovered to be unfounded that might have been corrected if the inmate had had access to

his files"); *Parole Release Decision Making and the Sentencing Process*, 84 Yale L. J. 810, 834 n. 107 (erroneous listing of a prisoner's brother's conviction as his).

There is also considerable evidence that, as Judge Curtin noted:

> in particular, serious errors are often made by the Government in determining that an inmate has links with organized crime. *Cardaropoli, supra*, at 997; *Masiello v. Norton*, 364 F.Supp. 1133 (D.Conn. 1973); *Franklin v. Shields, supra; LaBonte v. Gates, supra* (App. 43).

This Court has previously noted with approval such a conclusion:

> Cardaropoli's Special Offender status, for example, was grounded in part in his alleged ownership of the Hideaway Lounge. Yet the Government later conceded that he did not own the Lounge; he was merely employed there as a bartender. In *Masiello v. Norton*, 364 F.Supp. 1133, 1136 (D.Conn.1973), Judge Zampano found no basis for the Board of Parole's conclusion that Masiello was a professional criminal who had played a significant role in a criminal organization. In sum, in Judge Zampano's words,
>
> > time and time again the government through various agencies has demonstrated to me that serious errors have been made in this field.
>
> Cardaropoli v. Norton, 523 F.2d 990, 997 (2d Cir. 1975)

In this case, there is a serious possibility of such errors. Coralluzzo's state presentence report contains the ambiguous and conclusory statement:

> The police department have information indicating that the defendant has established connections with either the Genovese or Gambino family of organized crime (App. 37).[7]

[7] One may be permitted to wonder about the specificity, quality, and reliability of "information" that a person has "established connections" to either one or the other of two supposedly tightly-knit rival groups.

This statement was ordered stricken from the presentence report by the sentencing judge, Justice Klein of New York State Supreme Court, when the affidavit from the District Attorney did not "respond to the material allegations of defendant's motion." (App. 27). Although we may assume that the State authorities have obeyed Justice Klein's order and have stricken this sentence from the report, there is a significant chance for this sort of misleading information to slip into the file from other sources. Corrections Law §212-2 provides that the information listed in §211 shall be before the Board at the MPI hearing. Section 211 provides:

> As each inmate under an indeterminate or a reformatory sentence is received in an institution under the jurisdiction of the state department of correction, it shall be the duty of the parole board while the case is still fresh to cause to be obtained and filed information as complete as may be obtainable at that time with regard to each such inmate. Such information shall include a complete statement of the crime for which he is then sentenced, the circumstances of such crime, all pre-sentence memoranda, the nature of his sentence, the court in which he was sentenced, the name of the judge and district attorney and copies of such probation reports, as may have been made as well as reports as to the inmate's social, physical, mental and psychiatric condition and history. It shall be the duty of the clerk of the court, the commissioner of mental hygiene and all probation officers and other appropriate officials to send such information as may be in their possession or under their control to the board of parole upon request. The board of parole shall also at that time obtain and file a copy of the complete criminal record of such inmate and any family court record that may exist.

Without being able to inspect that material—and he was here shown none of it— Coralluzzo can never know whether other police reports in the hands of the probation department, or

in the possession of the District Attorney or other authorities, may have entered the Parole Board's case file as part of the "statement of the crime .... or the circumstances of such crime." Further, there may be in the case file a copy of the Federal presentence report (to which Justice Klein's order had no application whatsoever) containing extracts from police reports similar to those references stricken from the state presentence report.

The statement of reasons provided Coralluzzo, including the characterization of his "involvement in narcotics traffic is deep rooted and high level," which goes far beyond the facts underlying Coralluzzo's convictions, further suggests the possibility that the Board may be relying on information to the effect that Coralluzzo has links with organized crime.

Appellee submits that allowing the prisoner access to his file would be materially helpful to him in avoiding the effects of such misstatement of facts. As this Court has previously stated, in requiring procedures which included disclosure of adverse evidence before a "special offender" label could be affixed to a Federal prisoner:

> The importance of these safeguards to the fairness of the classification proceedings is both apparent and significant. *Cardaropoli v. Norton*, 523 F.2d at 997.

In *Cardaropoli*, this Court required a considerable range of procedural rights be afforded to those whom the Bureau of Prisons would label as "Special Offenders"—including the right to be "fully informed . . . of the evidence against him"—where the prisoner's interest in avoiding being so classified, although significant, is less than his interest in avoiding erroneous denial of parole. It would be highly anomalous if this Court were to deny, in the parole release context, even the minimal right to know the evidence on

which the determination is being made, while requiring it in the context of "special offender" labelling proceedings.

In *Carson v. Taylor*, 540 F.2d 1156 (2nd Cir. 1976), this Court recognized, in the slightly different context of parole revocation proceedings, the value of allowing the parolee to inspect the actual evidence to be used against him.

> A parollee must be afforded the opportunity for effective rebuttal of allegations against him. Although a formal hearing and a formalized cross examination are not necessary, the Supreme Court recognized in *Morrissey* that no one's interest—neither the public's nor the parolee's—is fostered by exposing the parolee to a substantial risk of recommitment upon the basis of erroneous contentions or conclusions grounded on innuendo or exaggeration, as distinguished from "verified facts." 540 F.2d at 1161.

The Court's contrast of the summary read to *Carson* and the actual documents made clear the need for disclosure of the actual file, and not just a summary, irrespective of the good faith or bad faith of the Parole Officer.[*] See also *Shepard v. United States Board of Parole*, Slip. Op. 5413, 5423-25 (2nd Cir. September 7, 1976).

Appellee submits that no lesser procedure is sufficient. *Carson* demonstrates the difficulties of a mere summary of the evidence. The instant case shows the inadequacies of mere

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[*] *Cf. Goss v. Lopez*, 419 U.S. 565, 579-80 (1975):

> The concern [over unwarranted suspensions] would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. This risk of error is not at all trivial. . . .

Surely the same is true in the parole release context.

reasons. The statement of reasons given Coralluzzo, as discussed more fully in Point II, *supra*, raises more questions than it answers; it wholly fails to assure Coralluzzo or this Court that no significant factual errors exist in the file; indeed, the reasons strongly suggest the possibility of error.

Further, none of the factors listed in *Holup, supra,* at pp. 5887-88, which might lessen the usefulness of, or need for, disclosure, exist in this case. The subject of Coralluzzo's alleged high level involvement in narcotics traffic was not made or discussed at the hearing; only the matters of which he was convicted, and his relation with only one other person was discussed (App. 19-21, 1a-5a). Coralluzzo thus had no knowledge that this alleged high level involvement might be relied upon by the Board, and had no opportunity to rebut "articulated reasons stated by the Board which militated against parole." *Id.*, at 5887-88. The hearing afforded Coralluzzo no meaningful substitute for disclosure of the file.

Appellee recognizes that nothing we argue here requires that every item in the file, regardless of its nature, be shown to a prisoner. We recognize that there may be certain circumstances where sensitive material should not be disclosed. As the District Court recognized, the State's interest in the confidential materials outweighs the prisoner's interest in disclosure in these circumstances. *Cf. Wolff v. McDonnell,* 418 U.S. 539, 561 (1974). But as the District Court also recognized, by its requirement that the Parole Board show good cause for nondisclosure, the rule should be disclosure, and nondisclosure the exception. As this Court held in *Carson,* 540 F.2d at 1163:

> In summary, we hold that due process requires that the parolee be afforded access to the documents that will be introduced against him, *unless the Parole Board meets the*

> *burden of establishing good cause for their nondisclosure, e.g.*, that disclosure will lead to reprisals or substantially interfere with a pending criminal investigation involving an allegation contained in the documentary record (emphasis added).

3. The third prong of the *Haymes* test is "any direct burden which might be imposed on the Board by this requirement." 525 F.2d at 543. Appellee submits that the minimal burden which a requirement of disclosure would impose on the Board is far outweighed by the other two factors which argue in favor of disclosure.

The burden of providing access in this case is minimal. As only disclosure at the hearing was ordered by Judge Curtin, there is no need for files to be shown to prisoners in advance, nor for prisoners to be brought to an area of the prison for such viewing at any time other than the hearing date, at which time prisoners could be shown the file while waiting for their interview, or the file could be given to the prisoners by simply handing it across the table at the hearing with a statement of what the Board was concerned about. Or, the file could be reviewed by the prisoner and his caseworker at their last meeting before the Board hearing. This burden seems insignificant.

A greater possible burden, as noted in *Holup, supra*, at 5889, might be the difficulty of redacting material which the Board would have good cause to withhold. This problem can easily be exaggerated. The National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 403 (1973), concluded that "in the average parole file little material is so sensitive that it cannot be reviewed with the inmate." Likewise, the consultant to the Administrative Conference in its study of federal parole procedures found that "most files do not seem to contain information that should not be

disclosed." Johnson, *Federal Parole Procedures*, 25 Ad. L. Rev. 459, 489 (1973).

Although there might be some small burden on the Board in redacting files already created, this could be accomplished by a brief review of the file materials followed by photocopying, with confidential materials obscured, of the pages on which sensitive material appears. For future files, the burden is even smaller, as the Board could create its files with the disclosure requirement in mind, and perhaps place the purportedly confidential or sensitive materials on separate sheets of paper which can be segregated in the file.

In sum, then, the prisoner's interest in the parole release proceeding is "enormous." Under the circumstances of this case, disclosure of the file contents would materially help to assure that the proceedings are not tainted by factual error or other arbitrariness, and would be far more useful than a mere statement of reasons. Disclosure of the file contents would not, in most cases, be unduly burdensome. Appellee submits, therefore, that Judge Curtin correctly weighed the various factors set out by this Court in *Haymes*, 525 F.2d at 543, and was correct in requiring disclosure of the file contents at Coralluzzo's MPI hearing.

B.

The same result is compelled by a somewhat different line of analysis. In *Morrissey v. Brewer*, 408 U.S. 471 (1972), in holding that due process applies to parole revocation hearings and requiring certain procedural safeguards in such proceedings, the Court described the dual function of parole revocation hearings:

> The first step in a revocation decision thus involves a wholly retrospective factual question: whether the

> parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions, does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve changes of rehabilitation? The first step is relatively simple: the second is more complex. *The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing anti-social acts. This part of the decision, too, depends on facts,* and therefore it is important for the Board to know not only that some violation was committed, but also to know accurately how many and how serious the violations were. Yet, *the second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary.* 408 U.S. at 479-80 (emphasis added).

As this Court put it in *Carson, supra*:

> the second, or dispositional, step, like the first, "depends on facts," requiring an accurate assessment of the parolee's past conduct and of the likelihood "of restoring him to normal and useful life within the law." . . . *In both steps the need to filter out distorted summaries of relevant facts is important.* 540 F.2d at 1163 (emphasis added).

See also, *Shepard v. United States Board of Parole, supra,* Slip. Op. at 5418-19. Although in a parole release proceeding, the first step described above is absent, the second, dispositional step, is, we submit, substantially identical to the parole release (or MPI) proceeding. The Board's decision at each of these hearings is "not purely factual but also predictive and discretionary," and all depend on facts for an accurate prediction as to the likelihood of the offender's restoration to "normal and useful life within the law."

This Court has thus already recognized that full disclosure of the evidence against an offender at a parole board proceeding is necessary for the sort of "predictive and discretionary" decisions made in a parole release proceeding. We believe, therefore, that Judge Curtin was correct in following *Carson* and *Shepard* and requiring disclosure of the case file to Coralluzzo.

Billiteri v. United States Board of Parole, 541 F.2d 938 (2d Cir. 1976), is also cited by Appellant Parole Board for the proposition that prisoners have no right to view the evidence on which parole release decisions are made. Although some language in that case can be so read, see 541 F.2d at 945, the case is not clear authority against Coralluzzo's claim, for several reasons. It is distinguishable, in that Billiteri had the opportunity to view and rebut all the materials at a later, though unauthorized, hearing in open Court. Further, the language denying "discovery" is dictum, as the case ultimately goes off on jurisdictional grounds. Most importantly, as Judge Curtin noted below (App. 44-47), such a reading of the *Billiteri* case is in very sharp conflict with this Court's other decisions in the parole board area, particularly *Carson, supra,* and *Shepard, supra.* If the stakes of "conditional freedom versus incarceration", *Johnson*, 500 F.2d at 928, are of such importance as to require the full disclosure of the actual document, prior to the hearing, in the parole revocation context, as required in *Carson* and *Shepard*, can it be that, in the parole release context where the stakes are exactly the same, Coralluzzo can be left as wholly in the dark about the contents of his parole file as he was here, consistent with the due process clause? At the very least, the Court in *Holup, supra,* did not regard *Billiteri* as settling the question of disclosure at parole release hearings.

The other cases cited by Appellant Parole Board, holding that examination by a prisoner of his parole file is not required by due process, should not be followed by this Court. *Barradale v. United States Board of Parole and Pardons*, 362 F.Supp. 328 (M.D. Pa. 1973), and *Wiley v. United States Board of Parole*, 380 F.Supp. 1194 (M.D.Pa. 1974), both rely on cases which conclude that due process does not apply to parole release decision making. Their fundamental premise is therefore one which has repeatedly been rejected by this Court, beginning with *Jonnson*.

Fisher v. United States, 382 F.Supp. 241 (D.Conn. 1974), denies access on the following reasoning:

> While there are strong policy arguments for disclosure of all information available for consideration by parole hearing examiners, perhaps subject to a limitation for specially sensitive material, it is difficult to see how the due process clause can require such disclosure at parole release hearings when such disclosure is not required of District Courts at sentencing. 382 F.Supp. at 243.

Appellee submits that this reasoning is incorrect and fails to take into account the radical differences between the sentencing proceeding and the parole relief hearing. As the Court put it in *Childs v. United States Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974):

> We think the part the judge has been accorded in sentencing is so different from the status of the Parole Board in the penological system as to call for a different approach to the due process issue . . . . Sentencing is by a judicial officer clothed with legislatively delineated alternatives within which to exercise his discretion. Parole consideration comes at a different stage of the over-all system, and is by a board possessing broad but legislatively undefined discretion except to grant or deny parole. For the board to exercise its discretion fairly and

> knowledgably within the purposes of the system, rational means—rational consideration—must attend its functioning. 511 F.2d at 1283-84.

See also *Walker v. Oswald*, 449 F.2d 481, 484 (2d Cir. 1971). Because the parole board's discretion is so broad—*i.e.*, so amenable to arbitrariness or abuse of unchecked power—it requires greater procedural checks on that discretion. In any event, in cases where a sentencing Court's discretion has been exercised against disclosure of the presentence report because of sensitive materials in that report, those materials could be redacted in the same manner as any other sensitive materials in the parole file.

Appellee urges that this Court follow the better-reasoned decision in *Franklin v. Shields*, 399 F.Supp. 309 (W.D.Va, 1975) and *Cooley v. Sigler*, 381 F. Supp. 441 (D. Minn. 1974), which require disclosure of prisoners' case files in parole release proceedings. Our entire argument here is aptly summed up in *Franklin v. Shields, supra:*

> It is clear . . . that erroneous and outdated information exists in inmate files and that without inmate access to the files it is unlikely that the Board will be made aware of it. It is also obvious that in some instances adverse information can be explained away. By affording inmate an opportunity to do this, parole determinations would be fairer and more reliable in both appearance and substance. 399 F. Supp. at 316-17.

Conclusion

For the reasons stated above, the judgment below should be affirmed.

Dated: Buffalo, New York,
December 30, 1976.

Respectfully submitted,

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APPENDIX.

Appellee's MPI Hearing, January 15, 1976

Q. I think your name is Ernest Coralluzzo? A. Yes, sir.

Q. From our records it would appear that a Court sentenced you to an indeterminate sentence, fixed the maximum at fifteen years and fixed no minimum, right? A. Zero to 15; yes sir.

Q. Under those circumstances the Board of Parole has to fix a time when you will appear for parole release consideration the first time. A. I understand that, sir.

Q. We don't decide whether you should be released at the time we fix, but we must have some way to determine when a guy is going to come before us for parole release consideration. We're going to fix that time today. We take into consideration all the time that you have served. It appears that you started serving this sentence in a state correctional facility on March 14, 1975. A. Yes sir.

Q. And before that you had already served seventeen days jailtime. A. That's correct.

Q. We take into consideration all the material in your case folder and anything that you call to our attention. Is there something you want to say? A. Well, the only thing I can say is that since I have been incarcerated I realize what I did before was wrong. And I have a wife and two children which I miss. There is no way to explain that. I just hope that you can understand my sincerity and in saying that any break you could give me—the Parole Board, I realize, has one thing to do, is to put someone back on the street that won't come before them again, and that would be a benefit to them. And I realize the material things are not important, and my wife and my children are.

Q. Okay. There is a federal sentence, isn't there. A. Yes, which is running concurrent.

Q. It is running concurrent with this. A. Yes.

Q. What is it two years eight months. A. Yes.

Q. No, two, eight year terms, that's what it is, two eight year terms concurrent. A. I can make parole I think in two years eight months.

Q. I see. A. I wrote to them concerning that.

Q. And you got a 20,000 dollars fine. A. Yes.

Q. Is that paid. A. Since I've been incarcerated let me say I lost my house. I had a trucking business. I lost that. I lost my house. My house is—my wife has moved from where we lived in New York State to Florida because her parents moved to Florida. She is about to go on welfare. She is applying right now. The house is in the hands of the lawyers, which I needed because my wife—

Q. Is the fine paid? A. Well, my lawyers are working on that. I don't think I can pay it after I pay them. See, there is something about a plea, a paupers plea or something like that. But whatever money's are left from the house that I had it is going to—one lawyer is suing, the lawyer I had for my wife, which she was indicted and brought to trial. And it was said in open Court or in the minutes somewhere that she was only indicted because they were afraid I would abscond or something. She has been in the hospital since. I have a problem with my daughter since, because I am not around.

Q. Someplace it says that this was a pound of "coke". A. It says in there a pound of cocaine, and there was a state sale. And the federal there was a mention of 26 kilo's of cocaine. Whatever is said there is a—I don't know what you call it, a snitch who was a friend of mine, Alvin Rossi, who has brought so far 60 people to trial, and I don't know, but my opinion is—and his wife testified, it is in the federal

minutes—to save himself he has come up with all kinds of fantastic stories.

Q. How much do you say? A. I say no amount. The thing is what we did is we ripped off drug dealers mainly. And when drugs had to be bought to show good faith he got drugs somehow or someway, but it was no big amount, never more than a pound, usually an eighth or a quarter of a kilo to show good faith so that the second time they brought a large amount of money and we could rip them off. That's what happened. Mainly that's usually the procedure we went through.

Q. I guess a lot of folks are out there waiting for you? A. There is a lot of people out there, I guess.

Q. How badly involved do you consider yourself to have been? A. To be perfectly honest, I met this one individual, Alvin Rossi, in December of 72. I had just bought a home. To make a long story short, I was three months behind in my mortgage. I had sold my wife's car. I had my youngest son was a baby a couple of months old, and my car had been repossessed. And it was like, I don't know, an omen or something. I met a friend of mine who had been in the drug business. I grew up in a bad neighborhood in the Fordham section of the Bronx. And I met this friend of mine. He had been ripped off by Rossi. And he asked me to go with him to recover some of his money, or recovery, you know, or to get restitution and in drugs or whatever. And he promised me $500 and I went with him.

Q. You must know how easy it is for a guy like me to point out to you, some guys keep themselves in apparently bad financial condition, you know, so they have got a show going. A. No, let me put it to you this way. I have always worked. And I am sure my record shows that. I have always

worked and worked hard. I have driven a truck. I was a truck helper. In March 73 from 59 when I was discharged from the service. In 1959 I was member of the teamsters local. I worked from 59 until 63 in the trucking business—to 73. I'm sorry. In 73 I was getting my break. A big contract was given for Gimbels Department Store—I don't know if you are familiar with them in New York City—from a man I was working with to another man, a different trucking outfit. The different trucking outfit was going to approach me because I knew the whole operation. And my whole income status would have been changed and I met him in December of 72. I bought the house just prior to that, the summer of 72. I was not ready to buy the house. But it was a good buy and my mother had loaned me some money. My inlaws loaned me some money. It was that three or four months span that I was about to lose the house and everything else that all this fell into place. It's not the idea that I didn't buy the money, I mean I didn't buy the house with money I made illegally. It was borrowed money and begged money and all other kinds of money. That was in December I met him.

Q. What did you do with the money? A. I paid off my debts, I tried to break away from this Alvin Rossi, but I wish and I hope you do and you can go into his files. He gets 100% disability for his mind. I didn't know that at the time. He is a maniac. When he first helped me and gave me this money I told him I was honest with him. After this first deal I met him with this friend of mine I told you about and became friendly with him. He invited me to Puerto Rico with about four or five other people. I went to Puerto Rico with him and sitting at a pool and told him I was going to lose my house, and this and that, and I needed money. And he lent me 18 hundred dollars right on the spot. After that when things came up or

whenever he got jammed up on his past problems, he called me 2 o'clock, 3 o'clock, 4 o'clock in the morning that he was being surrounded at his mother's house by different people and all this and that, and he would bring it up to me that if it wasn't for him I would have lost my house and I would not have this or that. The more I tried to break away from him the harder it was. Finally I did break away from him in November, 73. It was eight or nine months of my life that was hectic, that I did a lot of wrong things. And I put a gun in my hands a lot of times. But I want to come back to this one thing, I realize now that the material things that I treasure, that I wanted for myself and for my family, aren't half as important as being with my daughter and my son as they are growing up right now, and with my wife who is alone.

Q. Okay. We will decide it. We will let you know, thanks for coming in. A. All right.

AFFIDAVIT OF SERVICE BY MAIL

RE: Ernest Coralluzzo
vs
NYS Parole Board & Members
of NYS Parole Board, Ind.

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson **being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.**

On the 30th **day of** December, **19**76
I mailed _____ **copies of a printed** Appellee **in** Brief **the above case, in a sealed, postpaid wrapper, to:**

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New York, New York 10007

2 copies to: Hon. Louis J. Lefkowitz, Attorney General
2 World Trade Center
New York, New York 10047
Att: Kevin J. McKay, Deputy Assistant Attorney General

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Robert C. Macek, Esq.
556 Franklin Street, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this
30th **day of** December, **19**76

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1977